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TAXATION - SPECIAL ASSESSMENTS - DUE PROCESS - REQUIREMENT OF NOTICE FOR REPAIR OF EXISTING IMPROVEMENT

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TAXATION — SPECIAL ASSESSMENTS — DUE PROCESS — REQUIREMENT OF NOTICE FOR REPAIR OF EXISTING IMPROVEMENT — Plaintiff brought this action against the Board of Commissioners of Wells County, Indiana, to quiet his title to 160 acres of land owned by him in the county and to enjoin enforcement of supplementary drainage assessments upon the property as permitted by Indiana law. Plaintiff contended that the statute [1] creating drainage districts was violative of due process of law and unconstitutional in that it authorized supplementary assessments to be made by the Board of Commissioners without the same notice and hearing which was required before the original assessment could be made. On demurrer, the Wells Circuit Court held for plaintiff and defendants appealed to the Supreme Court of Indiana. *Held,* due process of law does not require that notice and a hearing be given property owners to validate additional assessments made against their property when such additional assessments are made in accordance with the original valuation of accrued benefit to their lands. *Board of Commissioners of Wells County v. Falk,* (Ind. 1943) 47 N. E. (2d) 320.

In the absence of action which is clearly arbitrary or capricious, a state, in the exercise of the general power of taxation [2] and consistently with due process

[1] Ind. Stat. Ann. (Burns, 1933), § 27-210.

[2] "The power of the legislature in matters of taxation is unlimited except as restricted by the constitution. The legislature, in the exercise of this power in making local improvements, may create a special taxing district without regard to the boundaries of counties, townships or municipalities. . . . It is clear, therefore, that the special tax to be paid under said law is an assessment of benefits to the persons and property taxed by the legislature in the exercise of its sovereign power of taxation." Board of Commissioners v. Harrell, 147 Ind. 500 at 504-505, 507, 46 N. E. 124 (1897). It is frequently said that the power of assessment, though springing from the general power of taxation, is greatly different from the general power of taxation in that taxes are levied for general revenue purposes whereas assessments are authorized solely for the benefit of the property on which they are imposed. See cases cited 28 L. R. A. (N. S.) 1124 at 1133 (1910).

of law, may by direct action of the legislature, impose special assessments without notice or hearing upon property benefited by the levy, and the legislative finding of the necessity of the improvement and of benefit to the lands affected will be conclusive and not subject to review by the courts.[3] Quite frequently, however, the legislature delegates to an administrative body the power to authorize improvements and to assess the costs against property in proportion to the benefits received. Where the assessment is imposed by such an administrative board acting pursuant to delegated authority, and there has been no determination by the legislature that the assessed property will be specially benefited, due process of law requires that notice and an opportunity to be heard be given the property owner at some time before the tax becomes irrevocably fixed and binding.[4] If, after a proper original assessment, additional levies are made for repairs and improvements to the project, the courts have generally held that neither notice nor hearing is required with respect to the supplementary proceeding, regardless of whether the levy is made to keep the existing improvement in proper repair [5] or to pay the cost of work not originally contemplated.[6]

[3] "And where, within the scope of its power, the legislature itself has found that the lands included in the district will be specifically benefited by the improvements, prior appropriate and adequate inquiry is presumed, and the finding is conclusive." Chesebro v. Los Angeles County Flood Control District, 306 U. S. 459 at 464, 59 S. Ct. 622 (1939). If no express findings are made by the legislature, a finding of benefit may be implied from the execution of the taxing power. Id. And a determination of a municipality upon the questions of the necessity of the improvement and of the benefit to the assessed property are as conclusive as if made by the legislature itself. Londoner v. Denver, 210 U. S. 373 at 379, 28 S. Ct. 708 (1907); Hancock v. City of Muskogee, 250 U. S. 454 at 458, 39 S. Ct. 528 (1919); Withnell v. Ruecking Construction Co., 249 U. S. 63, 39 S. Ct. 200 (1919). And, of course, if a tax such as a poll tax or an excise tax is imposed without regard to the valuation of property, notice and hearing is not required. Hagar v. Reclamation District, 111 U. S. 701, 4 S. Ct. 663 (1884).

[4] Londoner v. Denver, 210 U. S. 373, 28 S. Ct. 708 (1908); Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 S. Ct. 56 (1896); Central of Georgia R. R. v. Wright, 207 U. S. 127, 28 S. Ct. 47 (1907). And see 37 MICH. L. REV. 1311 (1939). As to notice and hearing generally in administrative proceedings, see 34 COL. L. REV. 332 (1934); 80 UNIV. PA. L. REV. 96 (1931); 89 UNIV. PA. L. REV. 808 (1941).

[5] The reason generally given is that repair was contemplated at the time of the original construction, and the parties having been notified of it are continued in court and bound by the supplementary proceedings. Breiholtz v. Board of Supervisors of Pocahontas County, 257 U. S. 118, 42 S. Ct. 13 (1921), affirming 186 Iowa 1147, 173 N. W. 1 (1919); Yeomans v. Riddle, 84 Iowa 147, 50 N. W. 886 (1891); McMillan v. Freeborn County, 93 Minn. 16, 100 N. W. 384 (1904); Board of Supervisors of Pottawattamie County v. Board of Supervisors of Harrison County, 214 Iowa 655, 241 N. W. 14 (1932), appeal dismissed 290 U. S. 595, 54 S. Ct. 125 (1923). See cases cited 84 A. L. R. 1098 at 1103 (1933). Cf. Harmon v. Bolley, 187 Ind. 511, 120 N. E. 33 (1918).

[6] People ex rel. Barber v. Chapman, 127 Ill. 387, 19 N. E. 872 (1889); Rouch v. Himmelberger, 305 Mo. 70, 264 S. W. 658 (1924); Plummer v. Pitt, 167 Iowa 632, 149 N. W. 878 (1914); Elkins v. Millard County Drainage District, 77 Utah 303, 294 P. 307 (1930); cases cited 84 A. L. R. 1098 at 1104 (1933).

But if the cost of repairs is assessed solely against an individual property owner because of alleged negligence on his part, he is entitled to notice and hearing on the question of negligence and the extent of damages.[7] And the repairs contemplated may be so extensive and extraordinary as to constitute a new construction which will require further notice and hearing if the assessment is imposed by a body other than the legislature.[8] Because of the holding of the Indiana court in *Harmon v. Bolley*,[9] it was sometimes supposed that the general rule was not followed in Indiana, and that it was necessary to give notice and hearing to Indiana property owners before additional assessments could be imposed consistent with due process of law.[10] However the decision in the principal case is clearly in support of the general rule [11] and removes any uncertainty with respect to this branch of Indiana law.

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[7] Kimball v. Board of Supervisors of Polk County, 190 Iowa 783, 180 N. W. 988 (1921).

[8] State v. McGuire, 109 Minn. 88, 122 N. W. 1120 (1909); Breiholtz v. Board of Supervisors of Pocahontas County, 257 U. S. 118, 42 S. Ct. 13 (1921).

[9] 187 Ind. 511, 120 N. E. 33 (1918). In this case, the original assessment was not made proportionate to the benefits received, the statutory method being unreasonable on the peculiar facts of the case. The decision could have been justified on that grounds. 187 Ind. 511 at 540.

[10] See comment, 84 A. L. R. 1098 at 1104 (1933).

[11] In the principal case, the court said: "While it may be true that the result reached in Harmon v. Bolley [187 Ind. 511, 120 N. E. 33 (1918)] may be correct upon the facts of that particular case, yet we can see no reason for applying its reasoning to a case like the instant one where the appellee does not question the necessity for drain repairs, the legality of the original proceeding for the construction of the drain, or the fairness of the levying of the charges according to the rule used in the original proceeding. In so far as the case of Harmon v. Bolley, supra, is inconsistent with this opinion, it is overruled." 47 N. E. (2d) 320 at 324.